Issue: Group I Written Notice (failure to follow policy); Hearing Date: 01/04/17; Decision Issued 01/12/17; Agency: VDOT; AHO: Thomas P. Walk, Esq.; Case No. 10894; Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: DEDR CASE NO. 10894

DECISION OF HEARING OFFICER

HEARING DATE: JANUARY 4, 2017
DECISION DATE: JANUARY 12, 2017

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing his Form A on August 16, 2016, challenging the written discipline issued to him on August 10, 2016. The Department of Employment Dispute Resolution appointed me as Hearing Officer on November 15. I conducted a prehearing conference by telephone on November 29, scheduling the matter for hearing on January 4, 2017. The hearing was held on that date and lasted approximately two hours.

II. APPEARANCES

The agency was represented by a lay advocate. It presented four witnesses and eight exhibits. Exhibit No. 7 was accepted into evidence for the limited purpose of illustrating the type of equipment being operated by the grievant at the time of the subject events.

The grievant appeared and represented himself. He presented no exhibits. He raised as an issue, prior to the hearing, the absence of two individuals listed by the agency as possible witnesses. After the agency rested its case and the grievant testified, he was given two options as to the absent witnesses. The first option was to have them testify by telephone, an option which

was suggested by the agency. The second option was for me to draw an adverse inference from their not being required to appear after having been listed as possible witnesses. He chose the second option.

III. ISSUE

Whether the agency acted appropriately in issuing the grievant a Group I Written Notice on August 10, 2016 for his actions on June 27, 2016?

IV. FINDINGS OF FACT

The grievant is an employee of the agency with approximately four years experience. On June 27, 2016 he was working as a transportation operator. His duties on that date included operating a piece of heavy equipment termed a tractor. This equipment is significantly larger than a standard farm tractor and is used for road work by the agency. He was assigned to work with another equipment operator, who was not an agency employee but an independent contractor.

On the preceding Friday the other operator had performed work on a road but had not completed it. The road was where the grievant resided. The work being performed involved bringing material from the road shoulders into the road and then leveling the surface to eliminate potholes or windrows. The other operator failed to complete the work on the grievant's road on that Friday. Upon completing their assigned duties on the morning of July 27 the grievant and the other operator decided to return to the grievant’s road to finish the work.

The grievant went directly to the worksite. The other operator first went to buy and eat

his lunch at a store. Agency policy is for warning signs to be posted at worksites prior to work being started. The signs are to alert the public to the presence of agency employees, heavy equipment, and loose debris in the road. The warning signs to be used by the grievant and the fellow operator were on the tractor operated by the contractor. The grievant began working on his road prior to the contractor's arriving with the warning signs.

On the afternoon of June 27 a complaint was received at an agency office regarding property damage to a vehicle being operated at or near the site where the grievant was working. The description of the incident was that debris in the road caused the damage. At the end of his shift on that date, the grievant was interviewed by his supervisor. The grievant admitted that he had been working in that area but denied that he had failed to post warning signs. The supervisor further investigated, included speaking with the contractor. When the superintendent again interviewed the grievant, he admitted that he had been working without warning signs.

Prior to June 27 the grievant had been involved in multiple other incidents involving equipment operated by him. He had received verbal counseling and a Notice of Improvement Needed on March 18, 2016. On August 10 the agency issued the grievant the subject Group I Written Notice. The notice cited only the incident on June 27 and the initial false denial by the grievant regarding whether signs had been placed. Agency employees receive frequent reminders of safety issues and the grievant had been trained on the need for appropriate signage prior to work being commenced.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual* (*GPM*). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The agency issued this discipline to the grievant for failing to place the warning signs before beginning work on his road on the afternoon of June 27. The grievant has now admitted that he failed to do so. No evidence was presented that signs were, in fact, placed. Therefore, I can only conclude that the grievant committed the act alleged.

The failing to place warning signs is a violation of established agency policy. I find that the omission by the grievant on June 27 does constitute misconduct that subjects him to appropriate discipline.

The key question in this matter is whether the discipline here was appropriate. Failure to follow policy or instructions clearly qualifies as a Group I offense. The Defendant, however, has made three arguments as to why the discipline is not appropriate. I have considered the missing likely testimony of the absent witnesses (as proffered by the agency and the grievant) and applied the adverse inference mentioned above in analyzing these arguments.

He has argued that he is being singled out by his supervisor for discipline. He bases his argument on the fact that other employees have similarly damaged agency equipment without any adverse consequences to them. The agency has argued, in response, that it is legally irrelevant because the supervisor was not the agency employee who upheld the discipline. I will assume, but not decide, that the argument of the agency is incorrect.

I also find, however, that the grievant's argument should not be accepted. The grievant is not being disciplined here for the prior damage to agency property. Although it is true this grievance is the latest step in progressive discipline against the grievant, I view the June 27 incident as being of a different nature and level. The failure to place warning signs can create a serious safety hazard. I have considered the fact that the subject road is in a remote area and not highly traveled. That fact would support a finding that damage to a vehicle or other calamity would not necessarily be probable; it does not mean that such incidents are not foreseeable. If the grievant had shown that other employees had put the public at risk without discipline, then his discrimination claim would carry more weight.

The grievant further argued that there actually may not have been a vehicle damaged on June 27 due to his actions and omissions. He questioned why a reasonable driver would not have gotten his attention and pointed out the damage while still at the site, rather than making a complaint by phone. He was unaware of any claim until he ended the shift and spoke to the supervisor. The agency argues, in response, that it is irrelevant whether the damage occurred as the grievant is being disciplined for the signage issue only. I disagree with the agency. With the grievant' s theory being that this charge is a trumped-up one, given to him as part of a pattern of harassment and bullying by the superintendent, he is entitled to make the argument. The best evidence with regard to the actual damage was Exhibit 6. It is an e-mail to the superintendent and multiple others regarding the damage claim on June 27. The time of the e-mail is shown as 2:37 p.m. on June 27. Although better evidence with regard to the claim could have been presented (such as the written notice of claim submitted by the property owner and settlement documents regarding the claim) for me to find that no vehicle was damaged and that this discipline is the result of a conspiracy involving the superintendent and others requires a leap of faith in the absence of other evidence. I am unwilling to make that leap.

The grievant's final argument is that the possible financial loss to him is disproportionate to the amount of the damage allegedly done to the vehicle. As stated above, I believe that the agency has appropriately framed this incident as one involving safety concerns. The grievant is understandably concerned about possibly losing future raises or bonuses while this discipline is active. I cannot adopt a standard whereby his speculative financial losses are balanced against substantial safety issues. Much greater injury or losses to a driver in the area were foreseeable. It was fortuitous that there were not much greater damages or injuries.

VI. DECISION

For the reasons stated herein, I uphold the issuance of the Group I Written Notice to the grievant on August 10, 2016.

VII. APPEAL RIGHTS

You may file an administrative review request within 15 calendar days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.[a]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

ORDERED this January 12, 2017.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer